80-1342

Office-Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

UNITED STATES OF AMERICA,

Respondent,

vs.

341.45 ACRES OF LAND, MORE OR LESS LOCATED IN THE COUNTY OF ST. LOUIS, STATE OF MINNESOTA, EDWARD M. ESSLING, ET AL.,

EDNA K. BASSETT,

Petitioner.

and

UNITED STATES OF AMERICA,

Respondent,

vs.

341.45 ACRES OF LAND, MORE OR LESS LOCATED IN THE COUNTY OF ST. LOUIS, STATE OF MINNESOTA, EDWARD M. ESSLING, ET AL.,

PAUL EDWARD ESSLING, ADMINISTRATOR OF THE ESTATE OF EDWARD M. ESSLING, DEC'D.

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States may obtain appellate review of a condemnation award prior to taking title to the property?

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OPINION BELOW

The opinion of a panel of the Court of Appeals dated October 27, 1980, is reported at 633 F.2d 108 (1980). This opinion and all unreported orders are printed in the appendix to this petition.

JURISDICTION

The judgment to be reviewed is dated October 27, 1980. This judgment was entered December 19, 1980.

A petition for rehearing and request for rehearing en banc was denied by order dated and filed December 4, 1980.

The jurisdiction of this Court is invoked pursuant to 28 USC 1254 and 28 USC 2106.

STATUTORY PROVISIONS INVOLVED

28 USC 1291

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .

STATEMENT OF CASE

Background: These cases involve tracts of land in the area of northern Minnesota now known as the Voyageurs National Park. The federal statute establishing the Park and authorizing condemnations of the private lands in the area was passed January 8, 1971 (16 USC 160). On April 12, 1976, the landowners in these two cases - Bassett and Essling - commenced inverse condemnation proceedings in the Court of Claims. This proceeding was dismissed by agreement after the Justice Department agreed to commence regular condemnation proceedings. (Appendix,pp.31,32,33) On June 27, 1977, the United States filed a Complaint in Condemnation under authority of the Voyageurs National Park Act (16 USC 160).

Facts: The Bassett property consists of 58 acres of land on Lake Kabetogama (Tract 60-177) and a 1.5 acre island

nearby (Tract 60-122). This land is improved property containing several buildings. The owner, Marvin Bassett, operated a private boys' camp on this land for many years. However, after the Complaint was filed, Marvin Bassett died. The boys' camp has been abandoned, and this litigation is being carried on by his widow and children.

The Essling property is 23.75 acres of unimproved land on Sand Point Lake (Tract 03-117). When the Complaint in condemnation was filed this land was owned by Edward Essling. However, during the course of this litigation Edward Essling has died, and the litigation is being carried on by his grandchildren.

Proceedings in the Court Below:

These two cases were tried together in District Court, and considered and decided together by the Court of Appeals. Pretrial motions and discovery took place between June 27, 1977 and October 2, 1979.

The trial took place in Duluth, Minnesota from October 2, 1979 to October 9, 1979. Nine witnesses, including five experts, testified. Over 140 exhibits were introduced. In accordance with applicable law, and with the concurrence of the parties, the trial judge instructed the jury that they were to value the land as of the date of their verdict. The jury returned a verdict on October 9, 1979 awarding $232,480.00 for the Bassett land,and $56,100.00 for the Essling land. On October 11, 1979, judgment was entered on behalf of Edna Bassett, widow of Marvin Bassett. On October 30, 1979, judgment was entered on behalf of Paul Essling as Administrator of the Estate of Edward Essling.

On December 21, 1979, the United States filed a Notice of Appeal. The landowners moved to dismiss the Appeal for lack of jurisdiction unless the government deposited some portion of the award

with the Clerk of District Court or otherwise took title to the property. The United States opposed the motion arguing that the judgments constituted final decisions for purposes of appellate review, even though the condemnation awards were mere offers to the United States which it could accept, or refuse by dismissing the action. On January 30, 1980, the Court of Appeals denied the landowners motion without prejudice to renew the issue in the brief. The landowners renewed the question of the appellate court's jurisidiction in the briefs, on oral argument,and in the request for rehearing. The government did not reply. In its decision, the Court of Appeals held that although this condemnation award was not binding on the government, the judgments were final decisions appealable under 28 USC 1291. The Court of Appeals also reversed the District Court Judgment, and ordered a

"new" trial, finding that certain evidentiary rulings of the trial court were erroneous.

REASONS FOR GRANTING THE WRIT

This Court should grant petitioners prayer for a Writ of Certiorari on the following grounds:

1. The Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court.

2. The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

ARGUMENT

1. The Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court.

The United States can proceed in condemnation either by a declaration of

taking pursuant to 40 USC 258(a), or by a complaint action. In a declaration of taking the government makes a deposit of money with the Clerk of District Court and takes immediate title. In a complaint action, the case proceeds to trial prior to any deposit or passage of title. These two cases, and almost all other national park condemnation cases, are complaint actions. The United States Government takes the position that the award in a complaint action is merely an offer subject to acceptance by the condemnor.[1] Thus, the government argues, it has three options after a verdict in a complaint action. First, it can pay the award and take title. Second, it can dismiss the

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1] The government, in response to the motion to dismiss the appeal for lack of jurisdiction, argued that the condemnor cannot be compelled to pay any award, citing United States v. Catlin, 142 F.2d 784,786(7th Cir. 1944) aff'd 324 U.S. 29 (1945). United States v. Cobb, 328 F.2d 115, 117 (9th Cir. 1964); In re United States, 257 F.2d 844, 849 (5th Cir.) cert. denied, 358 U.S. 908 (1958).

proceeding without prejudice![2] Third,

2] Rule 71A of the Federal Rules of Civil Procedure provides:

(i) Dismissal of Action

(1) As of Right. If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) By Stipulation. Before the entry of any judgment vesting the plaintiff with title or lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if the parties so stipulate, the court may vacate any judgment that has been entered.

(3) By Order of the Court. At any time before compensation for a piece of property has been determined and paid and after motion and hearing the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

(4) Effect. Except as otherwise provided in the notice, or stipulation of dismissal, or order of the court, any dismissal is without prejudice.

This Rule was cited to the Court of Appeals. The Court apparently accepted the government's argument that the government may abandon the proceedings at any time before payment without leave of the Court. See fn. 1. Landowners, however, are entitled to certain costs if the government abandons, 42 USC 4654(a)(2).

it can appeal the award prior to electing whether to take or abandon. The Court of Appeals accepted the government's position in toto.

The landowners' position is that the Court of Appeals lacked jurisdiction to consider the district court judgments[3] until the condemnor takes title. At the time the government filed its notice of appeal, the status quo was as follows: a) there had been no taking, b) no date of taking had been established, and c) it was not yet determined whether any taking of the land would ever occur. These landowners contended there was no final decision to review.

Perhaps the leading case in this

3] 28 USC 2414 provides as follows:
Payment of final judgment rendered by a district court against the United States shall be made on settlement by the General Accounting Office.

As a practical matter, the judgment creditor cannot forcibly collect from the United States without further court action. See fn. 1.

court regarding finality is Catlin v. United States, 324 U.S. 229 (1945). In Catlin the landowner in a condemnation proceeding sought an appeal to determine the validity of the taking prior to a final determination of just compensation. The United States had filed a declaration of taking and taken title. The Court of Appeals dismissed the appeal because of the lack of a final decision regarding just compensation in District Court. This Court affirmed, stating:

> . . . ordinarily in condemnation proceedings appellate review may be had only upon an order disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here.
>
> 324 U.S. at 233

The proceedings in District Court in these two cases obviously did not "dispose of the whole case". These landowners still have title to the

property, and no date of taking has even been established. The necessity for abstention by the appellate courts is more compelling than in Catlin. The procedural posture of this case forebodes endless, and piecemeal, trials and appeals![4] Practical considerations as well as technical construction require relief by this Court, Gillespie v. United States, 379 U.S. 148 (1964); Catlin v. United States, supra; Moore's Federal Practice Sec. 110.07.

2) Departure from accepted course of judicial proceedings.

The resolution of the question raised drastically affects all pending and future condemnation cases instituted by complaint rather than by declaration of taking. The procedure sanctioned by

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4] The Court of Appeals cited language from Danforth v. United States, 308 U.S. 271 (1939), in its discussion of finality. Danforth did not consider the question of finality.

the Court of Appeals is obviously and grossly unfair to landowners![5] These landowners argued in the Court of Appeals, and maintain now, that the procedure amounts to a deprivation of just compensation for the taking of private property. The procedure allows the government to arbitrarily and capriciously determine the date of taking, a proposition this Court condemned in United States v. Dow, 357 U.S. 17,25 (1958). The determination of just compensation for private property becomes a legislative question rather than a judicial question, contrary

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5] The Court of Appeals cited 42 U.S.C. Sec. 4651(7) which provides:

> (7) In no event shall the head of a Federal agency either advance the time of condemnation or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature to compel an agreement on the price to be paid for the property.

This statute is of no practical utility to landowners. The procedure sanctioned by the Court of Appeals is inherently coercive, whatever the motive.

to this Court's holding in Monogahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622 (1893). The Court's are rendered subservient negotiating tools of the condemnor. This Court has held that the constitutional requirement of just compensation derives its content from basic equitable principles of fairness, United States v. Fuller, 409 U.S. 488, 490 (1973); United States v. Virginia Electric and Power Co., 365 U.S. 624, 631 (1961). The opinion of the Court of Appeals requires these landowners to proceed to another trial, and perhaps numerous appeals and retrials, while the condemnor reserves its decision on whether it will take the land.

The opinion of the Court of Appeals also departs from the accepted course of judicial proceedings because it is purely advisory, at least with respect to the United States. Moreover, it is doubtful whether the opinion is even

binding on the parties, since the decision only relates to a determination of value of the land as of October 9, 1979. That will not be the date of taking at the "new" trial. Federal courts may make precedents only as an incident to the determination of actual controversies. There must be a dispute requiring the adjudication of a present right upon established facts, Ashcroft v. Mattis, 431 U.S. 171 (1977). Fundamental fairness, as well as the integrity of the judicial process, requires the condemnor to take title to property before review by appellate courts.

CONCLUSION

The Court of Appeals lacked jurisdiction to review the condemnation awards until the date of taking, and fact of taking was established. The judgment of the Court of Appeals should be vacated for lack of jurisdiction.

Petitioners respectfully pray that this Court grant the Petition for Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-2075

United States of America,

Appellant,

v.

341.45 Acres of Land, more or less, located in the County of St. Louis, State of Minnesota, Edward H. Essling, et al.

Edna K. Bassett,

Appellee.

No. 79-2083

United States of America,

Appellant,

v.

341.45 Acres of Land, More or Less, Located in the County of St. Louis, State of Minneosta, Edward M. Essling, et al.,

Paul Edward Essling, Adm. of the Estate of Edward M. Essling, dec'd.

Appellee.

Appeals from the United States District Court for the District of Minnesota

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Submitted: September 9, 1980

Filed: October 27, 1980

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges

ROSS, Circuit Judge.

The United States appeals two condemnation judgments totaling $298,580 resulting from a jury verdict in a condemnation case involving land located in Voyageurs National Park in northern Minnesota. We conclude that the district court[1] erred in admitting evidence regarding the highest and best use of the land and therefore we reverse and remand for a new trial.

In 1971, Congress authorized condemnation of certain lands for the establishment of Voyageurs National Park. The land within the park, of concern in these appeals, is owned by Edna Bassett and Paul Essling. The jury awarded $232,480 for the Bassett land. The land consists of approximately 60 acres of mainland located on Lake Kabetogama and an unimproved island of approximately 1.5 acres on the same lake. The 60 acres

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1] The Honorable Miles W. Lord, United States District Judge for the District of Minnesota.

of mainland consists of basically two parcels of land. The first parcel of approximately 20 acres is located on the shore of Lake Kabetogama and is bordered on the north by Gold Portage River which is approximately 100 feet wide. The first parcel is joined on its northwestern corner by the second parcel of approximately 40 acres. The second parcel does not front on the lake, however, the Gold Portage River runs through the middle of the parcel. Access to the land is approximately two miles by boat and the nearest road is two to two and one half miles from the land. On the 20 acre parcel there are a few abandoned buildings which were used for a boys' camp. Other than these buildings the land is unimproved and no efforts have been made toward subdivision of the land.

At trial the landowners' appraisers testified that the highest and best use

of the land was as a residential recreational subdivision. Gary Hawkinson, one of the landowners' appraisers, testified at length concerning two different methods that could be used to subdivide the complete 60 acre parcel and island into lots. The plans and proposed plats showed that the property could be divided into either 42 or 24 lots. "Plan 2" called for 42 lots included 21 lots that would not front on either the lake or the river. "Plan 1" consisted of 24 lots, approximately 16 of the lots would have river frontage while the balance would have lake frontage.

The government objected to testimoney concerning subdivision of the land as "lacking foundation as to marketability, as to feasibility, and as being speculative and conjectural." The trial judge stated that "the jury will have to decide whether or not they believe

that property is as valuable as this man says it is by virtue of the fact that he has indicated it can be subdivided in this way." Hawkinson valued the 60-acre tract and 1.5 acre island at $275,000. Victor Vik, another appraiser for the landowners, valued the land as a residential recreational subdivision at $297,000. The government's appraiser, Douglas Furen, testified that the highest and best use of the 20 -acre parcel was as single-family residential recreational development or cabin sites. However, in contrast, Fruen testified that the highest and best use of the 40-acre parcel was as timberland. Fruen valued the total Bassett land at $76,600.

Hawkinson also testified as to the costs of developing the Bassett land under both Plans 1 and 2. Hawkinson testified that his cost deduction under Plan 1 was $32,000 and under Plan 2 was

$46,000. Hawkinson and other of landowners' witnesses testified concerning the costs of subdividing, developing and marketing the 60 acre tract.

The jury awarded $56,100 for the Essling land. The land consists of 23.75 acres of unimproved land located on an inlet which leads from Grassy Bay to Staege Bay. The property has approximately 660 feet of waterfront along the inlet which measures from 100 to 250 feet in width in front of the tract. The nearest road is 6 to 9 miles from the land and access by boat is a trip of 7 to 8 miles.

Hawkinson testified that the highest and best use of the Essling tract was as a recreational condominium development[2] and placed the value of the tract

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2]Hawkinson also testified that the Essling land could be subdivided into lots. However, almost all of Hawkinson's testimony regarding the Essling land centered on the condominium plans.

at $81,000. Hawkinson submitted two different condominium plans for th 23.75 acres, each of which proposed 24 units on the site. Some evidence regarding the costs of "trails" and a sewer system was also introduced.

The government objected to the introduction of the condominium plans as lacking "a foundation for any demand for condominiums in the area" and as lacking "foundation as to feasibility, marketability, compliance with applicable health and zoning regulations, speculative and conjectural." These objections were overruled.

The government's appraiser, Fruen, testified that the highest and best use for the Essling land was as sites for one to three cabins and valued the land at $16,500.

I. Admissibility of Evidence of Highest and Best Use

The government argues that the district court erred in not excluding as speculative and remote the evidence that the highest and best use of the land was as subdivision and for condominiums.

In Olson v. United States, 292 U.S. 246 (1934) the Supreme Court stated:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Id at 255 (emphasis added) (citations omitted).

The Supreme Court in Olson also noted that "physical adaptability alone" for a certain use "cannot be deemed to affect market value." Id. at 256. Olson

cautions that:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should ge excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value--a thing to be condemned in business transactions as well as in judicial ascertainment of truth.

Id. at 257 (citations omitted).

Thus, Olson teaches that a proposed "use" requires a showing of reasonable probability that the land is both physically adaptable for such use and that there is a need or demand for such use in the reasonably near future.

Our concern in this case is whether the landowners established that the proffered uses of the land were reasonably probable so as to avoid mere speculation and conjecture. The trial judge believed that the jury could decide whether subdivision of the property would be feasible and whether there would be a demand for such lots. There was no

preliminary review of the potential use evidence prior to its admission by the trial court.

The Fifth Circuit in United States v. 320.9 Acres, County of Monroe, Fla. [Monroe], 605 F.2d 762 (5th Cir. 1979), found that "[a]t the very least" it is the responsiblity of the trial judge "under Rule 71A(h) [FED R. CIV. P.] to screen the proffered potential uses and exclude from jury consideration those which have not been demonstrated to be practicable and reasonably probable uses." Id. at 815. We recognize as did the court in Monroe that there is authority for the proposition that the trial judge should actually determine the highest and best use issue. The Supreme Court has stated that Rule 71A(h) "provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented." United States v. Reynolds,

397 U.S. 14, 19 (1970). Reynolds established that a "scope-of-the-project" issue was adecision for the trial judge and not the jury. Id. at 20. The Fifth Circuit in Monroe found that the issue of highest and best use could not be characterized as a "preliminary issue" as was the "scope-of-the-project" issue in Reynolds and thus declined to hold that the highest and best use issue was solely for the judge. Monroe, supra, 605 F.2d at 817. We agree with the reasoning of the Fifth Circuit in Monroe and therefore apply the standards of Monroe to the admission of the highest and best "use" evidence.

First, the trial judge should screen the evidence concerning potential uses. Monroe, supra, 605 F.2d at 815. Then, the trial judge should decide whether "the landowner has produced credible evidence that a potential use is reasonably practicable and reasonably probable

within the near future * * *." If credible evidence of the potential use is produced, the jury then decides "whether the property's suitability for this use enhances its market value, and, if so, by how much." Monroe, supra, 605 F.2d at 817.

The trial judge's screening of the evidence does not require an extensive and detailed review of all the evidence. Rather, the judge need only find that there is credible evidence that the property is adaptable to the use and that there will be a need or demand for such use in the near future. See also United States v. 478.34 Acres [Cook], 578 F.2d 156, 159-60 (6th Cir. 1978).

After reviewing the trial transcript and exhibits in this case, we find that the landowner's evidence regarding need or demand in the near future for the proposed uses is less than credible. Although there was controverted

testimony regarding the physical adaptability of the property to these uses, i.e., zoning, sewer requirements, we will assume for the purpose of this appeal that phyiscal adaptability was established. Thus, we assume, without deciding, that the Bassett land could be subdivided and developed as proposed and that the Essling land could be developed with condominiums. However, as noted in Olson, physical adaptability of the land to a proposed use does not end the inquiry. The landowners are also required to introduce credible evidence that there is or will be a demand for the proposed use in the reasonably near future. It is this evidence of demand for the proposed use in the near future which we find lacking in this case.

II. Subdivision of the Bassett Land

Regarding the plans for subdivision of the Bassett property, Hawkinson was asked if he was aware of any subdivisions in the area without road access which

had back lots which had been sold. Hawkinson replied: "not right offhand, because it's been the trend to just develop the lake front property." Vik testified that the majority of construction had been on waterfront. The only construction Vik noted as not on waterfront were cabins at certain resorts which were about 350 feet from the lake. Fruen testified that the time for development of the Bassett land without a lake view would not arrive until all the other lakeshore property had been developed.

The landowner also submitted numerous plats of both government and private subdivisions. These plats establish that the vast majority of subdivisions in the area surrounding the park are located on lakefront property. The "comparable sales" identified by the landowners' appraisers were of mainly platted lots or islands. However, none of these sales of platted lots involved

property which either fronted on a river rather than a lake or involved lots which did not have any waterfront.

The record simply does not contain any credible evidence that there is an actual demand for riverfront or back lots or that such demand will occur in the reasonably near future. The proposed subdivisions for the Bassett land included many lots which either were riverfront lots or lots without any waterfront. Therefore, we find that the district court erred in admitting evidence that the approximately 40-acre tract through which the Gold Portage River runs could be subdivided. See United States v. 47.3096 Acres in Oxford Township, Erie Co., Ohio [DeChant], 583 F.2d 270, 272 (6th Cir. 1978), and United States v. 2,635.04 Acres, Allen and Barren Cos., Ky. [Berry], 336 F.2d 646, 648 (6th Cir. 1964).

The 20-acre tract with lakefront

may be suitable for subdivision if credible evidence shows a demand by developers for such property. However, Hawkinson's "Plan 2" called for a number of back lots on the 20-acre tract and there is no evidence in the record establishing a market for such lots. To credibly establish demand for such lots, we believe that more than a few sporadic sales of such lots are necessary, Rather, there must be some evidence that others have developed and sold such lots, so as to establish a trend, at least, toward that type of development of lakefront property. We recognize that the land adjacent to this property has been stifled in its development due to the park. But, it also seems apparent that the park, itself, has for the last ten years increased the demand for surrounding lake property. Thus, if there is an actual demand for back lots or riverfront lots we believe the landowners will be able

to show such demand.

III. Condominium Development of the Essling Land

Hawkinson testified, at length, about the suitability of the Essling land for development of 24 condominium units. However, on cross-examination Hawkinson admitted that he did not know of any condominiums in northern Minnesota that did not have road access. He also stated that there were no condominiums in Voyageurs National Park. Hawkinson identified, by name, two areas in northern Minnesota which have been developed with condominiums having road access. However, on cross-examination Hawkinson admitted that these condominiums were located around skiing areas. Hawkinson testified that the Essling land was an ideal location for a condominium and stated that he felt "it would go over wonderful because it's the first of its kind."

Based on the lack of credible evidence of a demand for the proposed use in the reasonably near future, the district court erred in admitting evidence that the highest and best use of the property was as a condominium site. As stated by this court in Mills v. United States, 363 F.2d 78, 81 (8th Cir. 1966):

> Value implies demand and a buyer. [The witness'] testimony assumed both but, apart from his own comment that he 'would be interested in buying tracts of land such as' those of the owners, afforded proof of neither. * * * [T]here must be more than a mere theoretical future demand and use. 'There must be some objective support for the future demand, including volume and duration. Mere physical adaptability to a use does not establish a market.'

(Citations omitted.)

IV. Comparable Sales

The landowners argue that their appraisers' opinions of the fair market value of the properties were based on comparable sales and the subdivision and condominium plans were merely an alternative feasible use. The record,

however, refutes the landowners' argument.

Hawkinson's valuation of the properties clearly was based on its highest and best use as subdivision or condominium. Hawkinson testified that his subdivision and condominium plans "verified" his opinion of fair market value. In reference to "Plan 2" for subdivision of the Bassett land, Hawksinson valued 21 "back lots" at $3,000 each although no comparable sales of such lots were placed in evidence.

More importantly, the bulk of the landownes' "comparable sales" evidence involved sales of small platted lots or islands. We have found a lack of credible evidence that "off lake" property is needed for subdivisions, therefore, the landowners' evidence of "comparable sales" would not sufficiently support their experts' opinions.

V. Finality

The landowners argue that the

judgments in this case do not constitute a "final decision" appealable under 28 U.S.C. Sec. 1291. The landowners believe that because the government is not compelled to pay the judgments or some portion thereof to the landowners and thus "take" the property, the judgments are not final decisions.

"A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). We have not found any authority for the position of the landowners that the failure of the government in a condemnation action to "take" the land prior to appeal robs the judgment of finality. As the Supreme Court has stated:

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within

> his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost.

Danforth v. United States, 308 U.S. 271, 284 (1939) (footnote omitted). The government may not, however, defer the deposit of funds in court in order to compel an agreement on the price of the property. See 42 U.S.C. Sec. 4651(7).

We, therefore, hold that the judgments were final decisions appealable under 28 U.S.C. Sec. 1291.

Conclusion

The jury's valuation of just compensation in these cases was closer to the landowners' appraisers valuation than that of the government appraiser. The valuation of the landowners' appraisers, we have found, was directly linked to the inadmissible evidence of the highest and best use. Also, the evidence of cost development of each tract was in reference to development of the complete parcel into either a subdivision or

condominium units. Thus, we cannot say that the admission of such evidence was harmless.

Our decision does not bar on retrial opinion testimony as to subdividing lake frontage into parcels or lots appropriate to and measured by demand for lake frontage parcels in comparable remote areas of Northern Minnesota lakes.

These cases are remanded for a new trial and the admissibility of highest and best use evidence is to be determined in accordance with this opinion. Each party shall bear their own costs on appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 79-2075 and 79-2083	)
UNITED STATES OF AMERICA,	)
Appellant,	) September Term, 1979
v.	)
341.45 Acres of Land, more or less, etc., et al.,	) Appeals from the United States District Court for the District of Minnesota
EDNA K. BASSETT and PAUL EDWARD ESSLING, etc.,	)
Appellees	)

Appellee's motion to require deposit of judgment as a requisite to the jurisdiction of the Court has been considered by the Court and is denied. The motion to dismiss is denied without prejudice to raising the claim in the briefs and at oral argument.

January 30, 1980.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 79-2075 and 79-2083	)	
United States of America,	)	
Appellant,	)	September Term, 1980
v.	)	
341.45 Acres of Land, more or less, etc., et al.,	)	Appeals from the United States District Court for the District of Minnesota
Edna K. Bassett and Paul Edward Essling, etc.	)	
Appellees.	)	

The Court, having considered petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

December 4, 1980

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MINNESOTA

FIFTH DIVISION

- - - - - - - - -

UNITED STATES OF AMERICA,
Appellant

-vs-

341.45 Acres of Land, mor or less, located in the County of St. Louis, State of Minnesota, Edward H. Essling, et al.,

Edna K. Bassett, Appellee

UNITED STATES OF AMERICA,
Appellant,

vs.

341.45 Acres of Land, more or less located in the County of St. Louis, State of Minnesota, Edward M. Essling, et al, Paul Edward Essling Administrator of the Estate of Edward M. Essling, deceased.
Appellee

No. 5-77-57 Civil
USCA 79-2075 and
USCA 79-2083
Clerk's Notice Under F.R.C.P. Rule 77d

You are hereby notified that in the above entitled cause,

on the 19th day of December, 1980, we filed the OPINION AND JUDGMENT of the United States Court of Appeals for the 8th Circuit dated 10-27-80 reversing the Judgment of the said District Court, in accordance with their opinion; also remanding to said District Court for proceedings consistent with the Opinion of the Court of Appeals; and further Ordering that each party shall bear their own costs.

ROBERT E. HESS, CLERK

By:/s/ Catherine M. Ptacek
Catherine M. Ptacek, Deputy Clerk

To: Thomas K. Berg, U. S. Attorney
John M. Lee, Asst. U. S. Attorney
234 U. S. Courthouse
Minneapolis, MN 55401

Attorney for _____

Philip M. Zeidner, Esq.
Department of Justice
Room 1533 Main Justice Bldg.
Washington, D. C. 20530

Attorney for _____

William W. Essling, Esq.
828 Minnesota Building
St. Paul, Minnesota 55101

Attorney for _____

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 5-77-57

UNITED STATES OF AMERICA, Plaintiff, v. 341.45 ACRES OF LAND, MORE OR LESS, LOCATED IN KOOCHICHING AND ST. LOUIS COUNTIES, STATE OF MINNESOTA, EDWARD M. ESSLING, ET AL., Defendants. In the matter of the acquisition by the United States of America of certain lands situate, lying and being in the Counties of Koochiching and St. Louis, State of Minnesota, for use in connection with the Voyageurs National Park Project of the National Park Service, United States Department of the Interior.	JURY VERDICT

We, the Jury, find that on October 9, 1979, the fair market value in cash of (Bassett) was $232,408.00.

We, the Jury, find that on October 9, 1979, the fair market value in cash of (Essling) was $56,100.00

Dated:

_____
(Foreperson of the Jury)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA-FIFTH DIVISION

CIVIL ACTION FILE NO. 5-77-57

UNITED STATES OF AMERICA,

vs.

341.45 Acres of Land, more or less, located in Koochiching and St. Louis Counties, State of Minnesota, Edward M. Essling, et al.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Miles W. Lord, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.

It is Ordered and Adjudged That the defendant Edna K. Bassett recover of the plaintiff, United States of America, the sum of Two hundred Thirty-two Thousand Four hundred Eighty and no/100 dollars ($232,480.00).

Dated at Duluth, Minnesota, this day 11 of October 1979.

APPROVED:
/s/ Miles W. Lord, Judge
U.S. District Court

HARRY A. SIEBEN
Clerk of Court
/s/Catherine M. Ptacek
Dep. Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA-FIFTH DIVISION

CIVIL ACTION FILE NO. 5-77-57

UNITED STATES OF AMERICA,

vs.

341.45 Acres of Land, more or less, located in Koochiching and St. Louis Counties, State of Minnesota, Edward M. Essling, et al,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Miles W. Lord, United States District Judge presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged That as to the Essling property (Tract 03-117), Paul Edward Essling, Administrator of the Estate of Edward M. Essling, deceased, shall recover of the plaintiff, United States of America, the sum of Fifty-six thousand one-hundred and no/100 dollars, ($56,100.00).

Dated at Duluth, Minnesota, this 30th day of October, 1979.

APPROVED:

/s/ Miles W. Lord, Judge
U.S. District Court

HARRY A. SIEBEN
Clerk of Court
/s/Catherine M. Ptacek
Dep. Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION
Civil No. 15-77-57

UNITED STATES OF AMERICA, Plaintiff, v. 341.45 Acres of Land, More or Less, Located in the County of St. Louis State of Minnesota, Edward M. Essling, et al, Defendants.	NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the judgment entered in this action on the 30th day of October, 1979.

Dated: December 21, 1979.

THORWALD H. ANDERSON, JR.
United States Attorney
/s/ John M. Lee
BY: JOHN M. LESS
Assistant U. S. Attorney

Filed Dec. 26, 1979
Harry A. Sieben, Clerk
By/s/ Catherine M. Ptacek
Deputy

June 30, 1977

FLF:JEB
90-1-23-2123

William W. Essling, Esquire
Johnson, Essling, Williams & Essling
Suite 828 Minnesota Building
St. Paul, Minnesota 55101

Dear Mr. Essling:

Re: Bassett, et al. v. United States, No. 148-76, United States Court of Claims

This office has received your correspondence dated June 24, 1977, forwarding your June 24 letter to the Land Acquisition Office of the Department of the Interior. The letter to the Land Acquisition Office rejected the acquisition offer made by the Department of the Interior and proposed a counter-offer to remain open until July 10, 1977. Plaintiffs' responses to the standard pretrial order on liability and damages are due on July 15, 1977.

By letter dated January 4, 1977, your office advised Trial Judge Wood that your clients would agree to dismiss No. 148-76 upon the filing of a declaration of taking or a condemnation suit, if done in time to allow for trial in the spring term of the district court. By letter dated March 3, 1977, this office indicated its willingness to prepare a stipulation for the dismissal of this action. Corresondence from your office dated March 11, 1977, expressed an interest that the condemnation proceeding be filed within sixty days following March 11, 1977. Your letter of June 16, 1977, indicates that counsel

had agreed that the Department of the Interior would request the initiation of the condemnation action at the conclusion of negotiations.

We have been informed by the Land Acquistion Section that the related condemnation action was filed in Duluth, Minnesota, on June 27, 1977, as No. 50-77-CIV-57. Please advise whether it is the intention of your clients to proceed with dismissal of the Court of Claims action. This office again states its willingness to prepare and forward the necessary stipulation for your consideration.

Sincerely,

Acting Assistant Attorney General
Land and Natural Resouces Division

By

James E. Brookshire
Attorney

UNITED STATES DEPARTMENT OF JUSTICE

Washington D.C. 20530

Address Reply to the
Division indicated
and Refer to Initials and
number
FLF:JEB August 2, 1977
90-1-23-2123

William E. Essling, Esquire
Johnson, Essling, Williams & Essling
Suite 628 Minnesota Building
St. Paul, Minnesota 55101

Dear Mr. Essling:

Re: Marvin Bassett, et al. v. United States,
No. 148-76, United States Court of Claims.

Enclosed please find an executed copy of the stipulation of dismissal filed with the Clerk of the Court of Claims in this action on August 1, 1977.

The filing of this document automatically dismisses the Bassett litigation in the Court of Claims without prejudice.

Sincerely,

Acting Assistant Attorney General

By: /s/ James E. Brookshire

James E. Brookshire
Attorney

Enclosure

No. 80-1342

APR 7 1981
ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDNA K. BASSETT AND PAUL EDWARD ESSLING, ETC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

JACQUES B. GELIN
THOMAS H. PACHECO
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States, in exercising its power of eminent domain, must take and pay for private property in accordance with a district court's award of just compensation before it may challenge the correctness of that award on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1342

EDNA K. BASSETT AND PAUL EDWARD ESSLING, ETC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-22) is reported at 633 F. 2d 108.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1980. A petition for rehearing was denied on December 4, 1980 (Pet. App. A-24). The petition for a writ of certiorari was filed on February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In June 1977, the United States, on behalf of the National Park Service, filed a complaint in condemnation in the United States District Court for the District of Minnesota, seeking to acquire three tracts of land for the Voyageurs National Park in northern Minnesota. Two of the tracts,

both owned by Edna Bassett, are located on Lake Kabetogama. One is a 60-acre parcel on the mainland, and the other is a 1.5-acre island. The third tract, owned by the estate of Edward Essling, is a 23.75-acre parcel located on a narrow inlet.[1] A jury determined that just compensation for the Bassett land was $232,480 and that just compensation for the Essling tract was $56,100 (Pet. App. A-27).

The government appealed, and the court of appeals reversed (Pet. App. A-1 to A-22), holding that the district court should not have allowed the jury to consider speculative evidence that the three remote tracts had highest and best uses as residential subdivision and condominium sites. The court of appeals rejected petitioners' argument that the district court's condemnation awards are not appealable until the government actually takes title to the property in question and pays the amount of the judgments either to the affected landowners or into the registry of the district court. Relying on *Danforth* v. *United States*, 308 U.S. 271 (1939), the court of appeals held that, because condemnation proceedings are intended to permit the sovereign to ascertain how much certain property will cost before deciding whether to buy it, the government should not be required to "take" property as a condition of appealing a condemnation award (Pet. App. A-20 to A-21).

ARGUMENT

The decision of the court of appeals is correct and follows well-established law. There is no conflict among the circuits, and, indeed, no federal court has ever suggested that the government must take title to property before it may appeal a district court's condemnation award. Petitioners' position is inconsistent with the fundamental purpose of

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[1]The caption of this case in the court of appeals refers to 341.45 acres of land, because the government's complaint sought to condemn other land in addition to the three tracts involved in the present petition.

condemnation proceedings, which is to enable the government to determine the price of property before deciding whether to buy it. Further review is therefore not warranted.

As petitioners themselves recognize (Pet. 6-7), the government either may make an irrevocable commitment to take land by proceeding under the Declaration of Taking Act, 40 U.S.C. 258a-258e, or it may proceed by a condemnation complaint, as it did in this case. When the latter procedural device has been used, federal appellate courts, including this Court, have routinely reviewed the resulting condemnation awards without requiring the government to take title to the property or to make a final decision on whether it wishes to take the property upon the completion of judicial review. See, *e.g.*, *Hanson Co.* v. *United States*, 261 U.S. 581, 582-583 (1923).[2] As this Court has recognized, the complaint method of condemnation allows the government to make an informed decision, after the judicial system has definitively set the condemnation award, regarding the feasibility and desirability of acquiring a particular piece of property. *Danforth* v. *United States*, 308 U.S. 271, 284 (1939). See also *Barnidge* v. *United States*, 101 F. 2d 295, 298 (8th Cir. 1939). This legitimate purpose would obviously be thwarted if the government were required to pay the

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[2]Petitioners' reliance (Pet. 9-10) on *Catlin* v. *United States*, 324 U.S. 229 (1945), is misplaced. *Catlin* held that a landowner may not appeal the validity of a taking until proper compensation has been determined and a final judgment entered. The Court sought to avoid piecemeal appeals on the separate questions of the validity of a taking and the sufficiency of the compensation awarded. *Id.* at 233-234. Here, by contrast, the only issue in the district court was compensation, that issue was determined by the jury, and final judgments were entered. In addition, *Catlin* was a proceeding under the Declaration of Taking Act; the Court interpreted that statute as not allowing a separate appeal on the propriety of the taking. *Id.* at 238. No declaration of taking was filed in the present case.

condemnation award and thus take the property in order to challenge the district court's ruling on appeal.

The judgments in this case were "final" within the meaning of 28 U.S.C. 1291. The judgments ended the litigation on the merits and left nothing for the district court to do.[3] Since the entire purpose of the district court proceedings—the ascertainment of compensation—had been achieved, and judgments awarding compensation had been entered, no bar to appeal remained. Although the government ultimately may decide not to acquire the tracts of land involved, this has no bearing on the finality of the judgments setting the amount that the government must pay if it wishes to proceed with the acquisition.

Petitioners assert (Pet. 11-12) that some unfairness may result if the government is permitted to appeal in these circumstances. But the interests of the landowners are protected. If the United States does not go forward with the condemnation, it will be liable for reasonable costs incurred by the landowners in the condemnation proceedings, including reasonable attorney, appraisal, and engineering fees. See Section 304(a)(2) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(a)(2). See also *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 n.3, 204 (1979). Accordingly, appeals of condemnation awards before the government decides whether to take property serve the government's legitimate interests without imposing any unreasonable burden on landowners.

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[3]If the United States had chosen to take title to these tracts after the condemnation judgments were filed, any further order of the district court, such as one confirming title in the United States, would have been purely ministerial. A decision "final" under 28 U.S.C. 1291 does not necessarily mean the last order that can possibly be made in a case. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ANTHONY C. LIOTTA
Acting Assistant Attorney General

JACQUES B. GELIN
THOMAS H. PACHECO
Attorneys

APRIL 1981

DOJ-1981-04

APR 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1342

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1342

EDNA K. BASSETT AND PAUL EDWARD ESSLING, ETC.,

Petitioners

v.

UNITED STATES OF AMERICA

REPLY OF PETITIONERS TO BRIEF OF UNITED STATES

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ESSLING AND DALY, LTD.

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IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1342

EDNA K. BASSETT AND PAUL EDWARD ESSLING, ETC.,

Petitioners

v.

UNITED STATES OF AMERICA

REPLY OF PETITIONERS TO BRIEF OF UNITED STATES

---

1. As To The "Statement"

At page 2, L 8-12, the government brief writer comments on an alleged holding of the Appeals Court. It is our view that such comment is deliberately inaccurate. The question here is of the "jurisdiction" of the Court of Appeals. We decline to comment upon the other errors of that court.

2. As To The "Argument"

At page 2 last line - page 3, L 1-2, the government brief announces the proposition that - "the fundamental purpose of condemnation proceedings . . . is to enable the government to

determine the price of property before deciding to buy it." What a wretched thought. Like the "Magna Charta", Clause 4 of Amendment 5, the actual basis for condemnation proceedings, has its purpose in the protection of the citizen. It is a restraint, a deterrent, a control, a check, and a discipline upon the power of government. It requires payment of "just compensation" which is measured in terms of "fair market value" and not by a price pleasing to the condemnor![1]

3. Without Unreasonable Burden On The Landowners

This pronouncement in the government brief is just plain bunk. In the context of these cases it is an absurdity. The government taking of these lands has been in process for the past eleven years. This is the fifth year of litigation. The original parties are dead. The widow Bassett and the Edward Essling granchildren are unimpressed by the pretense of governmental concern about unreasonable burdens.

The requirement of finality is to be

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[1] The Department of Interior via its land acquisition expert publicly announced in the Voyageur Area that the intention was to acquire lands at 30¢ on the dollar.

given a practical construction, Gillespie v. U. S. Steel Co., 379 US 148, 85 S Ct. 308. The government wants another go at a jury trial to see if it wants these properties. Enough is Enough and such vacillation after eleven years cannot be tolerated. If it does not want the land it should have petitioned the District Court under 71A(i) to abandon. If it wanted these lands, it should have deposited the funds awarded. In either case, there would have been a final decision. If the government is given another trial to make up its mind on acquisition we are not in "danger of denying justice by delay", Gillespie, supra, we have denied it,period. The landowners property will not have been "taken without due process of law", 5th Amendment Cl. 3, it will have been taken by too much process.

It is submitted that the appeal taken below to the 8th Circuit Court of Appeals was not from a "final decision".

Dated: April 14, 1981.

WILLIAM W. ESSLING
Attorney for Petitioners
828 Minnesota Building
St. Paul, MN 55101
(612) 224-4818